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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

J. LEE GREGG et al., Plaintiffs and Appellants, v. BAKER & MCKENZIE et al., Defendants and Respondents.	D041547 (Super. Ct. No. GIC765205)

APPEAL from a judgment of the Superior Court of San Diego County, E. Mac Amos, Judge. Reversed and remanded with directions.

Plaintiffs J. Lee Gregg, John L. Gregg, DM Partners, a general partnership, and John L. Gregg, as trustee under the will of J. Lee Gregg (together Plaintiffs) appeal a judgment entered in favor of defendant law firm Baker & McKenzie, a general partnership (Baker), after the trial court granted Baker's motion for summary judgment. Plaintiffs contend the court erred by concluding: (1) Plaintiffs were collaterally estopped

from asserting damages resulting from Baker's professional negligence or misconduct; and (2) Plaintiffs could not reasonably rely on Baker's alleged misrepresentations.

FACTUAL AND PROCEDURAL BACKGROUND

In 1957 J. Lee Gregg and other persons bought 470 acres of real property in the San Dieguito Valley, taking title as tenants in common. In or about 1980 title to the property was transferred to a trust. In 1987 Baker's predecessor in interest (MacDonald, Halsted & Laybourne, a law firm that later merged with Baker) began representing that trust and advising it regarding transfer of ownership of the property to a limited partnership.

In 1992 a limited partnership agreement (Partnership Agreement) was signed, forming the San Dieguito Partnership, L.P. (SDP), which acquired ownership of the property. San Dieguito Valley, Inc., a corporation (SDVI), was SDP's general partner. SDP's limited partners included Plaintiffs and about 20 others (all of whom apparently were successors in interest to the original 1957 tenancy in common owners). J. Lee Gregg and John L. Gregg, among others, were named as directors of SDVI. Roy Collins was a director and president of SDVI. Section 15.4 of the Partnership Agreement, as subsequently amended in 1992, granted each limited partner with a five percent or greater interest in SDP a right of first refusal (Right of First Refusal) to purchase any SDP property at the same price and on the same terms of any bona fide purchase offer that SDP accepts for that property. Section 16 of the Partnership Agreement granted each limited partner (regardless of percentage ownership) a "buy-sell" right (Buy-Sell Right), allowing a partner, on the occurrence of specified events, to elect to force SDP to either

sell the other partners' interests to that electing partner or buy that electing partner's interest, based on the proportionate amounts of the election price set by the electing partner that the partner attributes to the full value of all of the limited partnership interests.

In 1999 SDP acquired title to real property located at the intersection of Interstate 805 and Nobel Drive (Property). Collins began negotiating the sale of the Property by SDP to Cisterra Partners, LLC (Cisterra). Baker represented SDP in the negotiations with Cisterra. Collins also agreed to personally enter into a joint venture with Cisterra to develop the Property after Cisterra purchased it from SDP. Pursuant to his joint venture agreement with Cisterra, Collins would receive one-third of Cisterra's interest in the joint venture, a $250,000 "infrastructure" fee, and a fee of $2 per square foot of buildings developed on the Property (or approximately $1,532,000). Although Collins apparently disclosed to SDVI's board his personal joint venture relationship with Cisterra, he did not disclose the fact that Cisterra would pay him more than $1.75 million if it purchased the Property from SDP for $14 million and the Property were developed. Collins then proposed to SDVI's board of directors that SDP sell the Property to Cisterra for $14 million. At board meetings, Plaintiffs argued that the Property was worth more than $14 million. Nevertheless, the board approved the sale of the Property to Cisterra for $14 million.

On or about March 5, 2000, SDP and Cisterra entered into a purchase and sale agreement for the Property (Purchase Agreement). Section 6.1.2 of the Purchase Agreement provided that the sale of the Property was contingent on written confirmation

by SDP that its partners' Rights of First Refusal and Buy-Sell Rights were waived by partners having those rights or that those rights had expired. The only SDP partners with a sufficient interest in SDP to have Rights of First Refusal at that time were Plaintiffs and Mary Paci (William Revelle's sister). Plaintiffs agreed to accept Cisterra's offer of $600,000 for assignment of their Right of First Refusal to Cisterra so, as Collins explained to Plaintiffs, Cisterra could participate in the sealed bidding process with Paci, who intended to exercise her Right of First Refusal, as required by the Partnership Agreement.[1] However, after Collins received Paci's unconditional exercise of her Right of First Refusal, Revelle promised Collins that he would obtain her waiver of that right. On March 14, after Collins transmitted to Plaintiffs a copy of Paci's exercise of her Right of First Refusal (but without disclosing her imminent waiver of that right), Plaintiffs assigned their Right of First Refusal to Cisterra. On March 15 Paci waived her Right of First Refusal. However, soon thereafter, Revelle apparently began to realize Plaintiffs were correct that the Property was worth more than the $14 million price in the Purchase Agreement. On March 20 Revelle caused Paci to attempt to revoke her waiver and re-exercise her Right of First Refusal. In response, Cisterra submitted its conditional exercise of Plaintiffs' Right of First Refusal, which was contingent on the validity of

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1 At that time, Collins and Cisterra apparently believed Revelle would deliver Paci's conditional exercise of her Right of First Refusal, which exercise would not be effective unless Plaintiffs exercised their Right of First Refusal. On acquisition of Plaintiffs' Right of First Refusal, Cisterra then could allow that right to expire unexercised and Paci's conditional exercise would not be triggered, allowing Cisterra to purchase the Property for $14 million pursuant to the Purchase Agreement without engaging in a sealed bidding process for the Property with the other holder of a Right of First Refusal.

Paci's attempted waiver and re-exercise. On April 3 SDVI's board concluded that only Paci had validly and timely exercised her Right of First Refusal to purchase the Property and directed Collins and Baker to notify Cisterra that SDP was terminating the Purchase Agreement because its conditions precedent were not satisfied.[2]

Cisterra Action. On or about March 31, 2000, Cisterra filed an action against Plaintiffs to recover the money it paid for assignment of their Right of First Refusal (Cisterra Action). On April 6 Cisterra filed a first amended complaint adding a cause of action against SDP for specific performance of the Purchase Agreement and related causes of action against Plaintiffs, Revelle and Paci. SDP retained Baker to defend it in the Cisterra Action. Plaintiffs retained Seltzer Caplan McMahon Vitek (Seltzer) to represent them. In May Plaintiffs filed a cross-complaint in the Cisterra Action. On September 22 they filed a first amended cross-complaint against Cisterra, SDP, Collins, Revelle, Paci and other persons, alleging fraud and deceit causes of action relating to the Purchase Agreement and other events in March 2000. Plaintiffs sought damages from the alleged fraudulent conduct that prevented them from exercising their Right of First Refusal to purchase the Property for $14 million and selling the Property for its higher fair market value.[3] In October 2000 SDP, Revelle and Paci filed motions for summary

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[2] In addition to Paci's exercise of her Right of First Refusal, eight of SDP's then 22 limited partners had not waived their Buy-Sell Rights, thereby allowing SDP to terminate the Purchase Agreement because of nonsatisfaction of conditions precedent.

[3] Although Plaintiffs' first amended complaint also sought declaratory relief that they were entitled to purchase the Property on the same terms as in the Purchase Agreement, Plaintiffs subsequently dismissed that declaratory relief cause of action.

adjudication on Cisterra's causes of action against them. Although those motions did not seek summary adjudication of any of Plaintiffs' causes of action, Plaintiffs filed papers opposing those motions, asserting the undisputed facts raised in those motions would have a collateral estoppel effect on their causes of action if they were not disputed at that time. The trial court granted in part the motions for summary adjudication of SDP, Revelle and Paci, concluding: (1) the Purchase Agreement had been terminated by SDP on April 14, 2000; (2) even without termination, the Purchase Agreement's conditions precedent were not satisfied because eight of SDP's limited partners had not waived their Buy-Sell Rights; (3) even without termination, the Purchase Agreement was voidable under Corporations Code section 310 based on Collins's failure to disclose to SDVI that he could receive about $2 million in fees in his joint venture with Cisterra to purchase and develop the Property; and (4) even without termination, the Purchase Agreement could be rescinded by SDP based on Cisterra's misrepresentations and omissions. Cisterra filed a petition for writ of mandate with this Court challenging the trial court's summary adjudication order.[4] However, in April 2001 Cisterra withdrew its writ petition and dismissed its causes of action against SDP, Revelle, Paci and Collins after agreeing to a settlement with those defendants.

In November 2000 SDP, represented by Baker, filed a cross-complaint against Plaintiffs, alleging they had marketed the Property for their own personal profit and

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4 Plaintiffs did not seek review of the trial court's summary adjudication ruling against Cisterra.

refused to disclose to SDVI's board the identities of other potential purchasers. That cross-complaint was subsequently dismissed by SDP.

In June 2001 Collins moved for summary adjudication and Revelle moved for summary judgment on Plaintiffs' first amended cross-complaint.[5] In August the trial court granted both motions. The court concluded in part that the Purchase Agreement had been voided by its January 2001 order and by a later resolution of SDVI's board. It also effectively concluded there was no Purchase Agreement to support Plaintiffs' Right of First Refusal because, as it concluded in its January 2001 order, the condition precedent that all limited partners waive their Buy-Sell Rights had not been satisfied. The trial court entered judgment for Collins and Revelle on Plaintiffs' cross-complaint. On appeal, we concluded the trial court's January 2001 determinations were binding on Plaintiffs under the doctrine of collateral estoppel. (*Gregg v. Revelle* (Oct. 1, 2002, D038961) [nonpub. opn.], p. 19.) We stated:

> "In sum, undisputed evidence, including the binding determination in the [trial] court's January 2001 order, indicated SDP's [Purchase Agreement] with Cisterra was terminated, voided and rescinded based on the failure of the [Purchase Agreement's] condition precedent requiring waiver of all [Buy-Sell Rights] under section 16 of SDP's Partnership Agreement, Collins's [Corporations Code section 310] statutory violation involving nondisclosure[,] and Cisterra's fraud. The January 2001 orders nullified the enforceability of the [Right of First Refusal] forming the basis for the damage element of [Plaintiffs'] fraud claim against Revelle. . . . Since [Plaintiffs] could not establish that [they] suffered any damage

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5 Plaintiffs and Cisterra subsequently settled their causes of action against each other.

> resulting from Revelle's alleged fraud, Revelle was entitled to judgment as a matter of law. [Citation.]" (*Id*. at pp. 26-27.)

Accordingly, we affirmed the judgment against Plaintiffs and in favor of Collins and Revelle. (*Id*. at p. 28.)

Plaintiffs' Exercise of Buy-Sell Right. On September 26, 2001, Plaintiffs exercised their Buy-Sell Right with an election price of $29 million. On November 1 Plaintiffs sent a letter to SDP's partners, explaining how they determined the $29 million election price. Although Plaintiffs believed the fair market value of the Property was "in the high 20s to low 30 million dollar range," they valued the Property at $13,734,254 "based upon the actions, representations, sworn testimony, and legal admissions of Revelle, Paci, Cherry, Collins, SDP, SDVI, Baker, and the individual board members of SDVI [that SDP] is limited to receiving approximately $14 million of value from its interest in [the Property]." Plaintiffs stated that the value of the Property in excess of $14 million "will go to either Paci, Cisterra or [Plaintiffs], which of course is the basis of the dispute in the [Cisterra Action]." Plaintiffs noted SDVI's board resolution that Paci validly and timely exercised her Right of First Refusal and information provided to them that "a final or near final sales agreement with Paci has been drafted, which [Plaintiffs] were told sold [the Property] to Paci for $14,000,000." The remainder of the $29 million election price was based on Plaintiffs' valuation of other SDP assets, including "the Villas," and other real property. Plaintiffs asserted they would not have exercised their Buy-Sell Right or their election price would have been much higher were it not for the alleged actions, representations, sworn testimony, and legal admissions regarding the Property.

On November 29 Plaintiffs sent a letter to SDP expressing their "shock" on learning SDP had now taken the position in the Cisterra Action that the Purchase Agreement was voidable because of Collins's undisclosed financial interest. Plaintiffs asserted that their exercise of the Buy-Sell Right had been made "in reliance upon SDP and [Baker's] representations that, contrary to [Plaintiffs'] urging, SDP would not seek to void the [Purchase Agreement]." Plaintiffs stated: "If SDP intends to reverse its position and attempt to void the [Purchase Agreement] because of Collins'[s] undisclosed interest or Collins'[s] actions, the representations regarding SDP's legal positions and strategies that were made to us, and subsequently induced us to exercise our [Buy-Sell Right], were false, and we hereby rescind our exercise of our [Buy-Sell Right]." Plaintiffs concluded: "If the representations we relied upon in making our [Buy-Sell Right] election were false, our section 16 election is rescinded[;] if they were not false, then demand is hereby made that SDP proceed to immediately close the purchase with us of our interest."

In response to Plaintiffs' exercise of their Buy-Sell Right, SDP elected to buy their partnership interest based on their proportionate interest in $29 million, which was their valuation of SDP's assets. In January 2001 SDP paid Plaintiffs $5,295,616 for their partnership interest.

Instant Action. In April 2001 Plaintiffs filed a complaint against Baker alleging three causes of action: (1) professional negligence; (2) breach of fiduciary duty; and (3) aiding and abetting breach of fiduciary duty. In September Plaintiffs filed a first amended complaint (Complaint) alleging the same three causes of action. The Complaint alleges facts relating to Baker's involvement in the drafting of the Partnership Agreement,

including the Rights of First Refusal and Buy-Sell Rights, and subsequent events involving the Purchase Agreement, Cisterra Action, and Plaintiffs' exercise of their Buy-Sell Right. The Complaint alleges that until Plaintiffs exercised their Buy-Sell Right, Baker and Collins continued to represent to Plaintiffs that SDP was going to sell the Property to Paci for $14 million and Plaintiffs' election price was based on their express representations that the Property would be sold for $14 million. The Complaint alleges that as a result of Baker's negligence and breaches of fiduciary duty, Plaintiffs have "suffered actual damage, including but not limited to substantial loss of investment, the expenditure of attorneys' fees and costs, the loss of the opportunity to exercise [Plaintiffs' Right of First Refusal] to purchase [the Property] now valued in excess of $35,000,000 for $14,000,000, and/or the valuation of their total partnership interest at $29,000,000 when the valuation should have and could have exceeded $45,000,000."[6] Baker answered the Complaint, alleging in part it was barred by collateral estoppel. Baker filed a motion for summary judgment or, in the alternative, summary adjudication, arguing that it did not represent Plaintiffs and did not prevent Plaintiffs from exercising their Right of First Refusal. Baker argued that collateral estoppel applied to preclude Plaintiffs from relitigating whether the Purchase Agreement was terminated and whether that termination

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6 Baker's brief on appeal concedes: "The Complaint articulated two theories of damages. First, it contended [Plaintiffs] lost [their Right of First Refusal] to buy the [Property] for $14 million. [Citation.] Second, it contended [Plaintiffs] lost in the buyout their share of the difference between a $14 million value of the [Property] and its fair market value."

prevented Plaintiffs from exercising their Right of First Refusal. Plaintiffs opposed Baker's motions for summary judgment and summary adjudication.

On November 14, 2002, the trial court issued its order granting Baker's motion for summary judgment. It rejected Baker's assertion that it had no attorney-client relationship with Plaintiffs, concluding Baker "owed [Plaintiffs] a duty, as attorneys for [SDP], to disclose material facts to partners and not to impede any partner's exercise of a [Right of First Refusal]." However, the court concluded the collateral estoppel effect of our holding in the Cisterra Action in *Gregg v. Revelle*, *supra*, D038961, precluded Plaintiffs' claim for damages arising out of their inability to exercise their Right of First Refusal to purchase the Property for the same $14 million price as under the Purchase Agreement. Apparently addressing the damages allegedly attributable to Plaintiffs' undervalued election price on exercising their Buy-Sell Right, the trial court stated:

> "Plaintiffs claim they are entitled to damages for the difference between the valuation of [$]14 million (when they sold their interest) and $31 million (which [P]laintiffs claim it was worth). However, when [P]laintiffs sold their interest in [SDP] in September 2000, they were represented by other counsel. Thus, they could not reasonably rely on representations of [Baker], who by then was representing an adversary in litigation brought by [P]laintiffs."

It further concluded that any damages arising out of Baker's drafting of the Partnership Agreement or failure to disclose conflicts of interest were speculative and inherently uncertain. Therefore, the court granted Baker's motion for summary judgment.

On December 12 the court entered judgment for Baker.

Plaintiffs timely filed a notice of appeal.

DISCUSSION

I

Summary Judgment Standard of Review

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

Aguilar clarified the standards that apply to summary judgment motions under Code of Civil Procedure section 437c.[7] (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 843-857.) Generally, if all the papers submitted by the parties show there is no triable issue of material fact and the "moving party is entitled to a judgment as a matter of law" (§ 437c, subd. (c)), the court must grant the motion for summary judgment. (*Aguilar*, at p. 843.) Section 437c, subdivision (o) provides that a cause of action has no merit if: (1) one or more elements of that cause of action cannot separately

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[7] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

be established; or (2) a defendant establishes an affirmative defense to that cause of action. Section 437c, subdivision (p)(2) states:

> "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

Aguilar made the following observations:

> "First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . .
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> "Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. . . .
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> "Third, and generally, how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial. . . . [I]f a defendant moves for summary judgment against . . . a plaintiff [who would bear the burden of proof by a preponderance of the evidence at trial], [the defendant] must present evidence that would require a reasonable trier of fact *not* to find any underlying

> material fact more likely than not--otherwise, *he* would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact." (*Id*. at pp. 850-851, fns. omitted.)

Summary judgment law in California no longer requires a defendant to *conclusively* negate an element of a cause of action. (*Id*. at p. 853.) It is sufficient for a defendant "to show that the plaintiff cannot establish at least one element of the cause of action" (*ibid.*), which the defendant can do "by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence[.]" (*Id*. at p. 854.) "Summary judgment law in this state . . . continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id*. at p. 854, fn. omitted.) *Aguilar* stated:

> "To speak broadly, all of the foregoing discussion of summary judgment law in this state, like that of its federal counterpart, may be reduced to, and justified by, a single proposition: *If a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment*. In such a case, . . . the 'court should grant' the motion 'and avoid a . . . trial' rendered 'useless' by nonsuit or directed verdict or similar device. [Citations.]" (*Id*. at p. 855, italics added.)

In deciding whether a defendant is entitled to summary judgment, the court "must . . . determine what any evidence [submitted by the plaintiff] or inference [therefrom] *could show or imply to a reasonable trier of fact*." (*Id*. at p. 856.) Therefore, if any evidence or inference therefrom shows or implies the existence of the required element(s) of a cause of action, the court must deny a defendant's motion for summary judgment because a reasonable trier of fact could find for the plaintiff. (*Id*. at pp. 856-857.) "But if the court determines that all of the evidence presented by the plaintiff, and all of the

inferences therefrom, show and imply [the existence of a required element of a cause of action] *only as likely as* [its nonexistence] *or even less likely*, it must then grant the defendant['s] motion for summary judgment, even apart from any evidence presented by the [defendant] or any inferences drawn therefrom, because a reasonable trier of fact could not find for the plaintiff." (*Id*. at p. 857, fn. omitted.) When a plaintiff relies on inference rather than evidence, "he must all the same rely on an inference implying [the existence of a required element] *more likely than* [its nonexistence], either in itself or together with other inferences or evidence." (*Ibid*.) An "inference is reasonable if, and only if, it implies [existence of the element is] *more likely than* [its nonexistence]." (*Ibid*.)

"On appeal, we exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.] 'The appellate court must examine only papers before the trial court when it considered the motion, and not documents filed later. [Citation.] Moreover, we construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.' [Citations.]" (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201-1202.)

II

Application of Doctrine of Collateral Estoppel

Plaintiffs contend the trial court erred by applying the doctrine of collateral estoppel to bar their action against Baker.

A

"Collateral estoppel [or issue preclusion] precludes relitigation of issues argued and decided in prior proceedings. [Citation.]" (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted.) The doctrine of collateral estoppel generally applies only if five threshold requirements are satisfied: (1) "the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;" (2) that issue "must have been actually litigated in the former proceeding;" (3) that issue "must have been necessarily decided in the former proceeding;" (4) "the decision in the former proceeding must be final and on the merits;" and (5) "the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Ibid*.) "The party asserting collateral estoppel bears the burden of establishing these requirements. [Citation.]" (*Ibid*.) Nevertheless, even if those requirements are satisfied, collateral estoppel will not be applied when injustice would result or if the public interest requires that relitigation not be foreclosed. (*Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1364; *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 181.)

B

In *Gregg v. Revelle*, *supra*, at page 19, we concluded the trial court's January 2001 determinations in the Cisterra Action were binding on Plaintiffs under the doctrine of collateral estoppel. We stated:

> "The determinations in the [trial] court's January 2001 order involving voiding of the [Purchase Agreement] for Collins's lack of full disclosure, rescission of such agreement for Cisterra's fraud, and failure of the agreement's condition precedent were binding on [Plaintiffs] under the doctrine of collateral estoppel." (*Gregg v. Revelle*, *supra*, at p. 19.)

In the Cisterra Action Plaintiffs' first amended cross-complaint sought damages *only* from alleged fraudulent conduct that prevented them from exercising their Right of First Refusal to purchase the Property for $14 million and selling the Property for its higher fair market value. In *Gregg*, we therefore concluded:

> "In sum, undisputed evidence, including the binding determinations in the [trial] court's January 2001 order, indicated SDP's [Purchase Agreement] with Cisterra was terminated, voided and rescinded based on the failure of the [Purchase Agreement's] condition precedent requiring waiver of all [Buy-Sell Rights] under section 16 of SDP's Partnership Agreement, Collins's [Corporations Code section 310] statutory violation involving nondisclosure[,] and Cisterra's fraud. *The January 2001 orders nullified the enforceability of the [Right of First Refusal] forming the basis for the damage element of [Plaintiffs'] fraud claim against Revelle. . . . Since [Plaintiffs] could not establish that [they] suffered any damage resulting from Revelle's alleged fraud, Revelle was entitled to judgment as a matter of law*. [Citation.]" (*Id*. at pp. 26-27, italics added.)

Accordingly, we affirmed the judgment against Plaintiffs and in favor of Revelle on Plaintiffs' first amended cross-complaint in the Cisterra Action. (*Id*. at p. 27.)

Having applied the doctrine of collateral estoppel against Plaintiffs in the Cisterra Action in *Gregg v. Revelle*, *supra*, we see no reason why it should not be applied against them in this action as to the same issues determined in the Cisterra Action. In the Cisterra Action, the issue of *damages* from Plaintiffs' inability to exercise their Right of First Refusal to purchase the Property for $14 million was actually litigated, necessarily decided, and that decision was final and on the merits. (*Lucido v. Superior Court*, *supra*, 51 Cal.3d at p. 341.) That identical issue of alleged damages is raised by Plaintiffs in the Complaint against Baker.[8] (*Ibid*.) Also, as we concluded in *Gregg v. Revelle*, *supra*, at page 20, Plaintiffs were in privity with Cisterra because both Cisterra and Plaintiffs opposed the motions decided by the trial court in its January 2001 order. (*Lucido*, *supra*, at p. 341.) Therefore, we again apply collateral estoppel to preclude Plaintiffs' allegation that they suffered damages from their inability to exercise their Right of First Refusal to purchase the Property for $14 million and sell it for its higher fair market value.

Plaintiffs do not cite a persuasive reason precluding our application of collateral estoppel. Although Plaintiffs assert they were prevented from fully and fairly litigating the issue of their damages in the Cisterra Action, nothing in the record or in the cases cited by Plaintiffs shows that Baker's alleged conflict of interest in representing SDP, Revelle and Collins in the defense of Plaintiffs' cross-complaint in the Cisterra Action

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[8] Although Plaintiffs' theories of liability supporting their claim for damages from Plaintiffs' inability to exercise their Right of First Refusal in this action may be different from their theories of liability in the Cisterra Action, it is the issue of alleged *damages* from their inability to exercise his Right of First Refusal that is identical and provides the basis for application of collateral estoppel.

precluded Plaintiffs from fully and fairly litigating that damages issue in that prior proceeding. (Cf. *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 Cal.App.4th 74, 96-97.) Furthermore, in *Gregg v. Revelle*, *supra*, at page 20, we stated: "[S]ince [Plaintiffs] had a full and fair opportunity to litigate the issues of the [Purchase Agreement's] voidability, rescindability and failed condition precedent in the proceedings in [the Cisterra Action] resulting in the [trial] court's January 2001 order, [Plaintiffs were] estopped from relitigating on Revelle's summary judgment motion those issues decided adversely to Cisterra and not then appealed by [Plaintiffs]." We decline to reach a contrary conclusion in this case.

Furthermore, although Plaintiffs assert collateral estoppel should not be applied because it effectively would allow Baker to use its own professional negligence as a defense to their action, they do not persuade us that justice or the public interest precludes application of collateral estoppel in this case. (*Bame v. City of Del Mar*, *supra*, 86 Cal.App.4th at p. 1364.) No injustice occurs by allowing a defendant to *defensively* assert collateral estoppel against a plaintiff who had a full and fair opportunity to litigate an identical issue in a prior proceeding. Also, Baker's alleged actions and omissions were not the sole reason Plaintiffs were unable to exercise their Right of First Refusal. Rather, as we noted in *Gregg v. Revelle, supra*, at pages 23 to 26, the failure of the Purchase Agreement's conditions precedent, Collins's nondisclosure violations, and Cisterra's fraud each provided independent bases for termination or unenforceability of the Purchase Agreement. Because a valid Purchase Agreement was required for Plaintiffs' Right of First Refusal to exist, they could not have suffered any damages from their inability to

exercise their "nonexistent" Right of First Refusal. *Ruffalo v. Patterson* (1991) 234 Cal.App.3d 341, cited by Plaintiffs, is inapposite.

C

However, to the extent the trial court in this case concluded that collateral estoppel applied to bar *all* of Plaintiffs' *damages* claims, it erred.[9] As noted *ante*, the Complaint alleges Plaintiffs suffered damages in two separate ways: (1) their inability in March 2000 to exercise their Right of First Refusal to purchase the Property for $14 million and sell it for its higher fair market value; and (2) the undervaluing of their election price on exercising their Buy-Sell Right in September 2000. In the Cisterra Action, including *Gregg v. Revelle*, *supra*, the only damages that Plaintiffs allegedly suffered arose out of their inability to exercise their Right of First Refusal to purchase the Property for $14 million and sell it for its higher fair market value. Plaintiffs' first amended cross-complaint in the Cisterra Action did *not* allege any facts relating to or damages suffered from the undervaluing by Plaintiffs of their election price on exercising their Buy-Sell Right in September 2000. Therefore, because that damages issue was *not* identical to, actually litigated, or necessarily decided in the Cisterra Action, collateral estoppel cannot apply to bar Plaintiffs' claim for those damages in the instant action. (*Lucido v. Superior*

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9 The trial court's order in this case stated: "[T]he court finds that the Court of Appeal's ruling [in *Gregg v. Revelle*, *supra*,] is binding on [P]laintiffs and collaterally estops them from claiming damages for their inability to exercise their [Right of First Refusal]. Further, as explained below, it appears the Court of Appeal ruling has effectively eliminated all of [P]laintiffs' damage claims and for that reason, summary judgment is granted." Therefore, it appears the trial court may have applied the doctrine of collateral estoppel to bar *all* of Plaintiffs' *damages* claims.

Court, *supra*, 51 Cal.3d at p. 341.) We therefore consider the other grounds asserted by Baker in its summary judgment motion papers to determine whether Plaintiffs do not possess, and cannot reasonably obtain, needed evidence to prove the damages element of the Complaint's three causes of action (i.e., that Plaintiffs cannot present evidence to support their claim that they suffered damages arising out of their exercise of their Buy-Sell Right). (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 853-854.)

III

Application of Summary Judgment Principles to Element of Damages

As the party moving for summary judgment, Baker had the burden of persuasion to show there was no triable issue of material fact and Baker was entitled to judgment as a matter of law. (§ 437c, subd. (c); *Aguilar v. Superior Court*, *supra*, 25 Cal.4th at p. 843.) Baker's summary judgment motion papers argued that Plaintiffs' causes of action had no merit because one or more elements of those causes of action could not separately be established. (§ 437, subd. (o)(1).) As *Aguilar* noted:

> "[T]he party moving for summary judgment [e.g., Baker] bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if [it] carries [its] burden of production, [it] causes a shift, and the opposing party is then subjected to a burden of production of [its] own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, *supra*, at p. 850.)

In reviewing the trial court's order granting Baker's summary judgment motion, we examine only papers before the trial court when it considered the motion and not subsequently filed documents. (*Seo v. All-Makes Overhead Doors*, *supra*, 97

Cal.App.4th at p. 1201.) Furthermore, we construe Baker's papers strictly, construe Plaintiffs' papers liberally, and resolve doubts about the propriety of granting the motion in favor of Plaintiffs. (*Id*. at pp. 1201-1202.)

Baker's summary judgment motion papers asserted two theories: (1) it did not represent Plaintiffs; and (2) Plaintiffs could not present evidence of damages suffered from their inability to exercise their Right of First Refusal to purchase the Property for $14 million and sell it for its higher fair market value.[10] As to Baker's second assertion, we conclude its summary judgment motion papers were insufficient to show Plaintiffs could not present evidence to support their claim that they suffered damages arising out of their exercise of their Buy-Sell Right. Baker's papers did not refute, in any manner, Plaintiffs' allegation that they suffered damages arising out of their exercise of their Buy-Sell Right. Rather, those papers addressed only Plaintiffs' alleged damages arising out of their inability to exercise their Right of First Refusal to purchase the Property for $14 million and sought only summary adjudication, not summary judgment, on that specific damages issue. In particular, Baker's separate statement of undisputed material facts and supporting evidence did *not*, in any way, refer to or submit evidence on Plaintiffs' claim that they suffered damages from the undervaluing of their election price on exercising their Buy-Sell Right in September 2000. Therefore, Baker did not carry its initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact regarding that aspect of Plaintiffs' alleged damages. (*Aguilar v. Superior*

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10 We address Baker's first assertion in part IV, *post*.

Court, *supra*, 25 Cal.4th at p. 850.) Because Baker did not carry its initial burden of production on that issue, Plaintiffs did not have a burden to produce any evidence in response to that issue. (*Id*. at pp. 850-851.) Accordingly, Baker did not carry its *burden of persuasion* that there was no triable issue of material fact on the issue of Plaintiffs' alleged Buy-Sell Right damages and thus on the element of damages as a whole. (§ 437c, subds. (c), (p)(2); *Aguilar*, *supra*, at pp. 843, 850-851.) Therefore, to the extent the trial court granted Baker's motion for summary judgment based on the lack of a triable issue on the element of damages, it erred.

IV

Baker's Alleged Duty to Plaintiffs

Baker asserts that its motion for summary judgment was nevertheless properly granted by the trial court because Baker did not have an attorney-client relationship with Plaintiffs.[11] Although that ground was the primary, if not sole, basis on which Baker sought summary judgment, the trial court did not rely on that basis in granting Baker's motion and, in fact, impliedly rejected Baker's assertion that it had no attorney-client relationship with Plaintiffs, concluding Baker "owed [P]laintiffs a duty, as attorneys for [SDP], to disclose material facts to partners and not to impede any partner's exercise of a [Right of First Refusal]." On appeal, Baker asserts the trial court erred and its summary

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11 Plaintiffs argue that Baker cannot raise this issue because it did not file a cross-appeal challenging this ruling by the trial court. For purposes of this opinion, we assume arguendo that Baker can raise this issue in Plaintiffs' appeal of the judgment.

judgment motion papers show it did not owe Plaintiffs any duties for which it could be found liable for breach on any of the Complaint's three causes of action.

"The question of whether an attorney-client relationship exists is one of law. [Citations.] However, when the evidence is conflicting, the factual basis for the determination must be determined before the legal question is addressed. [Citation.]" (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733.) In the context of an attorney for a limited partnership, we concluded that although mere representation of a partnership does not per se constitute representation of its individual limited partners, the attorney *may* have an implied duty to the limited partners based on representation of the partnership. (*Johnson v. Superior Court* (1995) 38 Cal.App.4th 463, 477-479.) The factors to consider in determining whether a partnership attorney has an attorney-client relationship with the individual partners include: (1) the size of the partnership; (2) the nature and scope of the attorney's engagement; (3) the kind and extent of contacts between the attorney and the individual partners; and (4) the attorney's access to financial information relating to the individual partner's interests. (*Id*. at pp. 476-477.) Nevertheless, primary attention should be given to whether the totality of the circumstances, including the parties' conduct, implies an agreement by the partnership attorney not to accept other representations adverse to the individual partner's personal interests. (*Id*. at p. 477; *Responsible Citizens*, *supra*, at p. 1733.) In *Johnson*, we overruled the trial court's grant of summary adjudication finding the partnership's attorney owed no duty to the partners as a matter of law. (*Johnson*, *supra*, at pp. 478-479.) We stated:

> "[T]he undertaking by [the defendant attorney] to represent the partnership, generally, imposed upon him *an obligation of loyalty* to the partnership and *to all partners in terms of their entitlement to benefits from the partnership*. Whether this constituted [the defendant attorney] an attorney, literally, for the individual limited partners, is of no great moment. He had a duty to the partnership to look out for all the partners' interests, and if this could not be accomplished because of conflicts of interests among them he had a duty to terminate the representation (or obtain appropriate waivers of the conflict). The evidence before us, if established at trial, is sufficient to permit a finding that this duty existed. A breach of it vested the partnership with an action against [the defendant attorney], which the limited partners are entitled to bring, either in their own right or on a derivative theory. The summary adjudication removing [the defendant attorney] and his law firm as defendants in these causes of action should therefore not have been granted." (*Johnson*, *supra*, at p. 479, fn. omitted.)

The duty arises out of the concept that partners are coclients with their partnership. (*Id*. at p. 470.)

Despite the extensive argument and evidence presented by Baker in its summary judgment motion papers regarding the purported lack of an attorney-client relationship between it and Plaintiffs, we conclude the undisputed facts before the trial court do not establish there is no triable issue of fact regarding the existence of a duty owed by Baker to Plaintiffs for which it could be found liable for breach on any of the Complaint's three causes of action. Baker does not dispute that it represented the limited partnership SDP. Rather, it disputes that it owed a duty to Plaintiffs, a limited partner of SDP. In opposition to Baker's motion for summary judgment, Plaintiffs submitted evidence showing there were numerous contacts between Baker and Plaintiffs and that Plaintiffs provided Baker with confidential information. In Plaintiffs' separate statement of disputed and undisputed material facts, they disputed many of Baker's purportedly

undisputed facts in its separate statement in support of its argument that it had no attorney-client relationship with Plaintiffs. Furthermore, Plaintiffs' separate statement asserted that Baker "handled personal legal matters on behalf of [Plaintiffs]." That statement was supported by references to declarations of John L. Gregg and J. Lee Gregg, which were submitted in opposition to Baker's summary judgment motion. On the record before us, we cannot conclude, as a matter of law, that Baker did not have an attorney-client relationship with Plaintiffs or otherwise owed no duty to Plaintiffs for which it could be found liable for breach on any of the Complaint's three causes of action. Rather, there appears to be triable issues of fact on the circumstances relating to the relationship between Baker and Plaintiffs and, in particular, on the issue of whether Baker, as SDP's attorney, owed an implied duty of loyalty to Plaintiffs, as one of SDP's limited partners, in terms of Plaintiffs' entitlement to benefits from the partnership. (*Johnson v. Superior Court*, *supra*, 38 Cal.App.4th at pp. 477-479.) Furthermore, Baker did not present any evidence showing Plaintiffs do not possess, and cannot reasonably obtain, needed evidence establishing that Baker owed them duties relating to their exercise of their Buy-Sell Rights. (*Aguilar v. Superior Court*, *supra*, 25 Cal.4th at p. 854.) Therefore, in moving for summary judgment, Baker did not carry either its burden of production or ultimate burden of persuasion on the element of duty. Accordingly, the trial court properly declined to base its summary judgment on that ground.

V

Reasonable Reliance

Plaintiffs contend the trial court erred by concluding, as a matter of law, that Plaintiffs could not have reasonably relied on Baker's alleged misrepresentations relating to Plaintiffs' exercise of their Buy-Sell Right, thereby precluding Plaintiffs' causes of action to the extent they were based on their exercise of their Buy-Sell Right.

In granting Baker's motion for summary judgment, the trial court stated:

> "Plaintiffs claim they are entitled to damages for the difference between the valuation of [$]14 million (when they sold their interest) and $31 million (which [P]laintiffs claim it was worth). However, *when [P]laintiffs sold their interest in [SDP] in September 2000, they were represented by other counsel. Thus, they could not reasonably rely on representations of [Baker], who by then was representing an adversary in litigation brought by [P]laintiffs*." (Italics added.)

Baker did not raise that reasonable reliance issue in its summary judgment motion papers. Assuming arguendo the trial court could grant Baker's summary judgment motion on a ground not raised by Baker in its summary judgment motion papers (see *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 69-71), we conclude the trial court erred by concluding, *as a matter of law*, that if a party is represented by counsel in a transaction, that party cannot reasonably rely on representations (subsequently proven to be false) made by the other party to that transaction or by that other party's counsel.[12]

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12 *Juge* stated: "[W]hen the trial court grants a summary judgment motion on a ground of law not explicitly tendered by the moving party, due process of law requires that the party opposing the motion must be provided an opportunity to respond to the ground of law identified by the court and must be given a chance to show there is a

When reliance is an element of a cause of action, that reliance must be reasonable. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) Reliance is an element of at least two of Plaintiffs' three causes of action (i.e., breach of fiduciary duty and aiding and abetting breach of fiduciary duty).[13] "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. [Citations.]" (*Ibid*.) "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." (*Blankenheim v. E. F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1475.)

" 'A lawyer communicating on behalf of a client with a nonclient may not . . . [¶] . . . knowingly make a false statement of material fact . . . to the nonclient . . . .' [Citation.] . . . 'A misrepresentation can occur through direct statement or through affirmation of a misrepresentation of another, as when a lawyer knowingly affirms a

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triable issue of fact material to said ground of law." (*Juge v. County of Sacramento*, *supra*, 12 Cal.App.4th at p. 70.) In the circumstances of this case, it is questionable whether Plaintiffs were afforded due process of law by being denied an opportunity to respond to the trial court's newly-found basis for granting Baker's summary judgment motion. (Cf. *Juge*, at pp. 70-73.)

13 Noting that breach of fiduciary duty "usually constitutes constructive fraud," *Alliance Mortgage* noted: "[J]ustifiable reliance . . . [is an] essential [element] of . . . constructive fraud [e.g., breach of fiduciary duty]." (*Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1239, fn. 4.)

client's false or misleading statement.' [Citation.]" (*Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 69, quoting Rest.3d Law Governing Lawyers, § 98, com. c, p. 58.) *Shafer* further noted: " 'In general, a lawyer who makes a fraudulent misrepresentation is subject to liability to the injured person when the other elements of the tort are established . . . .' [Citation.] This rule 'applies equally to statements made to a sophisticated person, such as to a lawyer representing another client, as well as to an unsophisticated person.' [Citation.] 'Misrepresentation is not part of proper legal assistance . . . .' [Citation.]" (*Shafer*, *supra*, at pp. 69-70, quoting Rest.3d, *supra,* § 98, com. g, p. 59, com. b, p. 58, § 56, com. f, p. 418.) In *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, the court concluded that an attorney may be held liable to a nonclient for fraudulent statements made during business negotiations. (*Id*. at pp. 201-202.) In *Cicone*, the sellers and the buyer in a business transaction were represented by their respective counsel during negotiations. (*Id*. at pp. 198-199.) *Cicone* stated: "An attorney must take pains to avoid negligent misrepresentation of material facts in negotiating business transactions with third parties and their attorneys." (*Id*. at p. 211.) Accordingly, the court reversed the trial court's judgment of dismissal entered after it sustained the cross-defendants' demurrer to the cross-complaint. (*Id*. at p. 213.) Similarly, a Colorado court of appeal reversed summary judgment for the plaintiff, concluding there was a triable issue of fact on the element of reasonable reliance even though the defendant "was represented by an attorney 'who read and approved every document.' " (*Boyles Bros. Drilling v. Orion Ind.* (Colo.App. 1988) 761 P.2d 278, 282.)

Based on these authorities, we conclude a party to a business transaction, or that party's counsel, is not immune, as a matter of law, from liability for misrepresentations knowingly or negligently made to the other party in the transaction simply because that other party is represented by his or her own counsel in negotiation of that transaction. In certain circumstances, a sophisticated party, and even his or her counsel, can be found by the trier of fact to have reasonably relied on misrepresentations made by the other party and/or that other party's counsel. Therefore, in this case the trial court erred by apparently concluding that if Plaintiffs were represented by their own counsel during negotiation of their exercise of their Buy-Sell Right, then they could not, as a matter of law, have reasonably relied on Baker's alleged misrepresentations relating to that transaction.

Furthermore, the record in this case does not show Plaintiffs were represented by counsel during negotiation of their exercise of their Buy-Sell Right. Rather, the record shows, at most, that Plaintiffs were represented by Seltzer *in the Cisterra Action*. Baker's separate statement of undisputed facts does not contain a statement that Plaintiffs were represented or assisted by Seltzer or other counsel in negotiating their exercise of their Buy-Sell Right, and we cannot presume that representation of a client in a litigation matter necessarily includes representation of that client in negotiation of a separate business transaction. Therefore, the trial court erred by granting Baker's summary judgment motion based on its conclusion that Plaintiffs could not have reasonably relied

on Baker's alleged misrepresentations relating to Plaintiffs' exercise of their Buy-Sell Right.[14]

VI

Summary Adjudication

Because Baker's summary judgment motion papers did not carry its burdens of production and persuasion to show there was no triable issue of material fact on an element of each of Plaintiffs' causes of action and that it was entitled to judgment as a matter of law, the trial court erred by granting Baker's motion for summary judgment.

However, Baker's motion papers alternatively argued: "Summary adjudication is appropriate to [Plaintiffs'] claim for damages arising out of the contention that [Baker] prevented [Plaintiffs] from exercising [their Right of First Refusal]." Arguing collateral estoppel precluded Plaintiffs' claim for damages arising out of their inability to exercise their Right of First Refusal to purchase the Property for $14 million, Baker's papers sought summary adjudication that Plaintiffs did not suffer damages from their inability to exercise their Right of First Refusal. In our discussion in part II.B., *ante*, we concluded collateral estoppel applied to preclude Plaintiffs' claim for damages to the extent that claim arose out of their inability to exercise their Right of First Refusal to purchase the Property for $14 million. Accordingly, although the trial court erred in granting Baker's

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14 Baker's extensive evidence and arguments regarding the reasonableness of Plaintiffs' reliance on its alleged misrepresentations do not show the issue of reasonable reliance is undisputed and that it is entitled to summary judgment. Rather, Baker's evidence and arguments on this issue are more appropriate for consideration by the trier of fact.

summary judgment motion, the court should have granted Baker's alternative motion for summary adjudication of the damages issue relating to Plaintiffs' inability to exercise their Right of First Refusal.

DISPOSITION

The judgment is reversed and the matter is remanded with directions that the trial court vacate its November 14, 2002 order to the extent it granted Baker's motion for summary judgment and to enter a new order denying Baker's motion for summary judgment but granting Baker's alternative motion for summary adjudication consistent with this opinion. Plaintiffs shall recover their costs on appeal.

McDONALD, J.

I CONCUR:

AARON, J.

HUFFMAN, J., concurring.

I concur fully in all parts of the majority opinion except Part V entitled "Reasonable Reliance." As to Part V, I concur only in the result.

I confess at the outset I believe the trial court correctly found reliance by the Plaintiffs on the purported misrepresentations of Baker & McKenzie was unreasonable. It is clear from the record that at one point a different law firm represented the Plaintiffs in an adversarial position against the partnership, which was represented by Baker & McKenzie. Thus, it seems utterly unreasonable for the Plaintiffs to "rely" on Baker & McKenzie's alleged statement that the property would be sold for $14 million in exercising their election under the "Buy-Sell" provisions of the partnership agreement. My belief the trial court was correct was buttressed by the concession of the Plaintiffs' counsel during oral argument that any statements of Baker & McKenzie on the issue of a possible sale of the property would have been in the nature of legal advice and not a statement of "fact." I find it very hard to believe anyone in the Plaintiffs' position at that time could reasonably rely on the advice of counsel who had represented the partnership against them regarding an earlier transaction involving the same property.

Since I have expressed my doubts that any person in the position of the Plaintiffs could establish reasonable reliance, why agree with the result of Part V of the majority opinion? I join in the result because Baker & McKenzie failed to raise the issue of the lack of reasonable reliance in its summary judgment papers. My review of the motion and its accompanying separate statement of undisputed facts confirms the observations in the majority opinion that this issue was not contained in the moving papers. Accordingly,

I believe it was inappropriate for the trial court to decide the motion on a ground never raised in the motion papers. (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 69-71.) One of the problems presented in appellate review of an issue raised apart from the moving papers is that we have no clear record of when, if ever, other counsel represented the Plaintiffs regarding the exercise of the buy-sell provision of the partnership agreement. Since the issue has not been developed with the clarity required for a dispositive ruling, I am compelled to concur in the reversal of the grant of summary judgment.

HUFFMAN, Acting P. J.